United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1904.

NO. 1410

276

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ROWENA THOMPSON DIETRICH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 3, 1904

Court of Appeals, District of Columbia

JANUARY TERM, 1904.

NO. 1410.

THE DISTRICT OF COLUMBIA, APPELLANT.

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ROWENA THOMPSON DIETRICH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

WASHINGTON MONOTYPE PRINTING COMPANY.

IN THE

Supreme Court of the District of Columbia

ROWENA THOMPSON DIETRICH, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 45,852, At Law.

a UNITED STATES OF AMERICA, }
District of Columbia. } *ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 (*Declaration, &c.*)
FILED, *December* 24, 1902.

In the Supreme Court of the District of Columbia.

ROWENA THOMPSON DIETRICH, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 45,852, At Law.

The plaintiff, Rowena Thompson Dietrich, sues the defendant, the District of Columbia, a body corporate for municipal purposes duly created and organized by virtues of the laws of the United States of America, for that heretofore, to wit, at the time of the happening of the grievances hereinafter mentioned, and for a long time prior thereto, it was, as it still is, the duty of the defendant, to keep and maintain the public streets and highways in the City of Washington, District of Columbia, in good repair and in safe and secure condition for travel; so that persons may safely pass and repass along, upon and over the same; and the plaintiffs says that among said public streets and highways, to which the duty of the defendant extended as aforesaid, is a certain public street designated on the ground plan of said city of Washington as K street Northwest, the center of which said K street is occupied by a roadway 50 feet in width, and the part of said K street South of said roadway consists of a sidewalk 15 feet in width immediately adjoining said roadway on the South, and of a parking 33 feet 10 inches in width immediately adjoining said sidewalk of the South, which said sidewalk, along the part of said K street situated

between 4th street Northwest and 5th street Northwest, up to, to
2 wit, the 12th day of May 1902, and for many years prior thereto, consisted of a brick pavement; and plaintiff says that that part of said parking of said K street immediately adjoining the West line of said 4th street at the Southwest corner of its intersection, with said K street, and extending Westward from the said West line of said 4th street, with the full width of said parking, a distance of, to wit, 20 feet, likewise consisted of or was covered with a brick pavement which was continuous with and formed a part of the brick sidewalks of said K street and said 4th street; and over and across the said brick pavement, occupying the aforesaid part of said parking, it had been the custom for many years prior to, as well as ever since the day last aforesaid, for persons in the City of Washington to pass and repass diagonally, in going on foot from the sidewalk along the West side of said 4th street to the sidewalk along the South side of said K street, and from the sidewalk along the South side of said K street to the sidewalk along the West side of said 4th street.

And the plaintiff avers that the defendant, wholly disregarding its duty in the premises, prior to the time of the happening of the grievances hereinafter mentioned, to wit, between the 12th and 17th days of May 1902, tore up, or caused to be torn up, the aforesaid brick sidewalk along the South side of said K street between said 4th street and said 5th street Northwest, and also tore up, or caused to be torn up, a portion of the said brick pavement covering the parking aforesaid, and wrongfully, carelessly and negligently removed or displaced certain bricks from the portion of said brick pavement next adjoining the South line of the said sidewalk of said K street, for
3 the purposes of laying a cement or asphalt sidewalk in place of the brick sidewalk so torn up as aforesaid, and did so negligently, carelessly and improperly lay, or caused to be laid, the said cement or asphalt sidewalk, and did so carelessly and negligently fail and neglect to join the said cement or asphalt sidewalk with or to the said brick pavement occupying that part of the parking aforesaid, that the surface of the said cement or asphalt sidewalk was elevated above the surface of the said brick pavement, in consequence whereof, and in consequence of the aforesaid bricks being removed or displaced from the brick pavement aforesaid, there was made and caused to be made a dangerous hole or depression of a depth of, to wit, 6 inches below the surface of said cement sidewalk, and of a width of, to wit, 12 inches, which hole or depression extended a distance of, to wit, 15 feet along the line where the said cement sidewalk and the said brick pavement, so occupying the part of the parking aforesaid, should have been properly joined together, and which said dangerous hole or depression was immediately across the direct line along which persons

were accustomed to travel when passing and repassing on foot diagonally to and from said 4th street and said K street at their intersection as aforesaid; whereby and in consequence of the negligence, carelessness and default of the defendant as aforesaid, said K street, at the place aforesaid, was made and became out of repair and in an insecure, unsafe and dangerous condition. And the plaintiff avers that the defendant, in still further disregard of its duty in the premises, during a long and unreasonable period of time, to wit, from
4 the time last aforesaid to the time of the happening of the grievances hereinafter set out, knowingly, wrongfully, unlawfully, carelessly and negligently allowed and permitted said K street, at the place aforesaid, to remain out of repair as aforesaid, and in an insecure unsafe and dangerous condition as aforesaid, and failed to fix or place, or caused to be fixed or placed, any light or lights, signal or signals, barricade or other warning, or protection, at or near said dangerous hole or depression, to denote or show that the same was insecure, unsafe and dangerous as aforesaid, and made no effort to secure the same against accident, or to warn persons passing along said K street, either by day or by night, of the existence of said hole or depression; of all of which the defendant had notice for a long time prior to the happening of the hereinafter mentioned grievances, to wit, for a period of two and a half months.

And the plaintiff evers, that on, to wit, the 2d day of August, A. D. 1902, about 9:30 o'clock P. M., while she was walking along said K street and passing from the sidewalk along the South side of the said K street to the sidewalk along the West side of the said 4th street, over the brick pavement as aforesaid, and using due and proper care on her part, and without any knowledge, notice or warning whatever of the existence of said hole or depression, she stepped suddenly, with her right foot, into the said hole or depression in said K street, at the place aforesaid, and was thereby thrown suddenly and violently upon the said brick pavement, and her right ankle was thereby severely sprained, wrenched and twisted, and the ligaments thereof greatly bruised, torn and lacerated, and said ankle and leg
5 seriously and permanently injured; and her system greatly shocked; and she was, and is otherwise, seriously hurt and permanently injured, whereby, and in consequence of all of which, she became sick, sore and lame, and wholly disabled for a long time thereafter, during all of which time she has suffered and still suffers great pain and anguish of body and mind, and was, and still is unable to walk on or use her right leg and foot; and she has been rendered unable to perform any labor or attend to the business of her ordinary employment, and her power to earn a livelihood has been permanently impaired and destroyed.

And the plaintiff avers that in consequence of the injuries aforesaid, whereby she has been unable to attend to the duties of her said employment, she has been deprived of the earnings which she would otherwise have received therefrom, and has thereby sustained great losses, to wit, the sum of $200.00 and she further avers that she has been forced to expend, and has expended, and has contracted to expend in payment for medical services, servant's hire, medicines and appliances, a large sum of money, to wit, the sum of $300.00 in and about endeavoring to be healed and cured of her said injuries.

Whereby, and in consequence of all said injuries received as aforesaid, and of all said losses sustained and expenses incurred as aforesaid, the plaintiff has been damaged in the sum of Ten Thousand Dollars ($10,000,00).

Wherefore the plaintiff brings this suit and claims Ten Thousand Dollars ($10,000.00) damages, besides costs.

LECKIE & FULTON,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the 20th day, exclusive of Sundays and legal holidays, occuring after the day of service hereof; otherwise judgment.

LECKIE & FULTON,
Attorneys for Plaintiff.

6

(*Plea of Defendant.*)
Filed, *January* 15, 1903.

In the Supreme Court of the District of Columbia.

ROWENA THOMPSON DIETRICH,
vs.
THE DISTRICT OF COLUMBIA. } No. 45,852, At Law.

The defendant, for plea to the plaintiff's declaration, filed herein, says it is not guilty in manner and form alleged.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for the Defendant.

(*Joinder of Issue.*)
Filed, *January* 26, 1903.

In the Supreme Court of the District of Columbia.

ROWENA THOMPSON DIETRICH,
vs
THE DISTRICT OF COLUMBIA. } No. 45,852, At Law.

The plaintiff joins issue upon the plea of the defendant filed in above entitled cause.

LECKIE & FULTON.
Attorneys for Plaintiff.

7 (*Memorandum.*)

December 22, 1903.
Verdict for Plaintiff for $5,500,00.
Supreme Court of the District of Columbia.
Friday, *January* 8, 1904.
Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

ROWENA THOMPSON DIETRICH, Plaintiff.
vs
THE DISTRICT OF COLUMBIA, Defendant. } No. 45,852, At Law.

Upon consideration of the motion for a new trial filed herein, it is ordered that said motion be and the same is hereby overruled and judgment on verdict is ordered: Thereupon, it is considered and adjudged, that the plaintiff herein recover of the defendant herein the sum of Five Thousand Five Hundred Dollars ($5,500.00) for her damages as aforesaid assessed by reason of the premises, together with her costs of suit to be taxed by the Clerk, and have execution therefor.

8 (*Notice of Appeal, &c*)
FILED, *January* 18, 1904.

In the Supreme Court of the District of Columbia.

ROWENA THOMPSON DIETRICH, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 45,852, At Law.

Now comes the defendant, the District of Columbia, and appeals to the Court of Appeals from the judgment entered against it in the

above-entitled cause, and the clerk will please issue CITATION to the plaintiff Rowena Thompson Dietrich.

A. B. DUVALL,
A. H. THOMAS,
Attorneys for Defendant.

9 In the Supreme Court of the District of Columbia.

ROWENA THOMPSON DIETRICH, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 45,852, At Law.

THE PRESIDENT OF THE UNITED STATES.

To Rowena Thompson Dietrich, Greeting: You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an Appeal filed in the clerk's office of the Supreme Court of the District of Columbia, on the 18th day of January, 1904, wherein the District of Columbia is Appellant, and you are Appellee, to show cause, if any there be, why the judgment rendered againt the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 18th day of January in the year of our Lord one thousand nine hundred and four.

JOHN R. YOUNG,
Clerk.

Supreme Court of the District of Columbia.

10

Friday, *February* 12, 1904.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

ROWENA THOMPSON DIETRICH, Plaintiff,
vs.
DISTRICT OF COLUMBIA, Defendant. } No. 45,852, At Law.

Comes now the defendant herein by its attorneys and presenting to the court its bill of Exceptions taken at the trial of this cause,

pray that the same be signed and made of record, now for then, which is accordingly done.

11 (*Bill of Exceptions.*)
Filed, *February* 12, 1904.

In the Supreme Court of the District of Columbia.

ROWENA THOMPSON DIETRICH,
vs.
DISTRICT OF COLUMBIA.
} No. 45,852, At Law.

(*Bill of Exceptions.*)

Be it remembered, that at the trial of this cause before the Honorable Mr. Chief Justice Clabaugh, the Chief Justice of the Supreme Court in and for the District of Columbia, and the jury regularly empaneled and sworn to try the issues pending between the plaintiff and the defendant, the plaintiff to maintain and prove the issues upon her part joined, offered as a witness C. E. Dietrich, who, having been first duly sworn, testified that he was the husband of the plaintiff and that he was in company with his wife, Mr. and Mrs. Lowd, and Mr. Hann, at the time of the accident to the plaintiff hereinafter set forth.

Whereupon, counsel for the District of Columbia objected to the competency of the witness as a witness respecting the injury of the plaintiff and its occurrence, which said objection the court then and there overruled, and the counsel for the defendant duly excepted to the ruling of the court.

After the said ruling of the court the said witness proceeded to testify concerning the accident to the plaintiff: That about 9 or 9:30 o'clock on the evening of August 2, 1902, the said persons,
12 including the plaintiff, were at the Southwest corner of 4th and K streets, Northwest; that Mr. Lowd and the witness were together, and Mr. Hann and Mrs. Lowd and witness' wife were together walking along K street towards North Capital street, and that at the corner of 4th street and K street, Northwest, witness and said Lowd turned into 4th street going South, and were about 30 feet ahead of Mr. Hann, Mrs. Lowd and Mrs. Dietrich, when witness heard his wife scream and say: "I think I have broken my foot," and saw her down; that she was right at the corner, at the fence, right at the edge of the sidewalk, the cement sidewalk; there is a new cement sidewalk which had been laid there, and she was right at the edge of that, down in a kind of excavation about 3 or 4 feet East from the

fence; and that witness rushed back to see plaintiff, and see what the trouble was, and asked her; and thereupon counsel for the defendant objected to the conversation, and counsel for plaintiff asked,

"Just what did you do, that was my question;" and the wit-
13 ness proceeded to state, "I put my hand down on her foot when she explained that she had broken her foot. I put my hand on it and felt it and I felt immediately that the ankle was almost twice the original size, and I said: "You are seriously hurt."

And thereupon counsel for the plaintiff asked: "Never mind what you said. Just say what you did; that is my question." And witness replied: "I put my hand on the foot and felt it." And counsel for plaintiff further asked: "Then what did you do?" And witness answered: "She said she was badly hurt."

Whereupon counsel for the defendant again objected to any conversation between witness and his wife, on the ground that the accident had happened at that time. But the court said: "I think that is about as near the res gestae as you could get, that is about as near the accident as could happen, it could not have been half a minute—If it is anything as to how the accident happened at that moment of time, I think he is entitled to repeat it." To which ruling the defendant by its counsel then and there duly noted an exception.

Whereupon counsel for the plaintiff told the witness to proceed with his answer and the witness continued: "I asked her, if she could walk, and she said: 'Oh, I don't know.' Mr. Lowd and Mr. Hann had lifted her up to her feet, and we tried to see whether she could walk or not. She seemed to be in great pain and commenced to cry, and began to be immediately nervous. As I would have expressed

it, she had gone all to pieces, and had no control over herself.
14 Mr. Lowd took her arm and I said: "I will go home and get a cab. You cannot go home in this condition."

And thereupon said witness proceeded further to testify that at the place where the accident occurred there was a depression of about 18 inches in width, extending out from the sidewalk, and of about the depth of four to six inches, and of a length of about twelve or thirteen feet from the fence out.

Upon cross examination the witness testified that the said depression extended about 18 inches out from the cement sidewalk on the brick, but not as great as at the place of the accident where it ranged from two to three or four inches in depth; that he did not see the said depression at the time, but examined it three or four days afterwards; that he did not stop to examine the place at all the night of the accident, and did not see any loose bricks on the evening of the accident; that he heard his wife scream when he was in front of the door of McDevitt's saloon.

On re-examination witness stated that McDevitt's place is about twenty-five or thirty feet from the point of the accident, and on further re-examination the witness stated that the depression of the sidewalk which he examined three or four days after the accident
15 was not measured by him.

The examination of said witness being concluded, C. B. Hunt was produced as a witness on behalf of the plaintiff and testified that he was engineer of highways in charge of surface work, paving streets, roads, alleys, sidewalks, and repairing same; that the work of laying the said cement sidewalk on K street was commenced the 12th day of May, 1902, and completed on the 17th day of May, 1902, and that the work was done by the Cranford Paving Company under a contract with the District, and that the Paving Company was paid therefor shortly after the 12th of June, 1902.

On cross examination the witness stated that the extent of this improvement of K street was that cement sidewalks were laid on both sides of K street between 4th and 5th street, and the work consisted in laying something over 2,000 square yards of cement walk in that particular item. On redirect examination the witness stated that the work was measured in detail, inspected and accepted before payment was made.

The examination of said witness being concluded, Daniel L. McDevitt was produced as a witness on behalf of the plaintiff and testified that he had resided for two years previous to the 12th of October, 1903, at No. 400 K street, and conducted a saloon business there; that he remembered the laying of the new cement sidewalk on K street. And thereupon the witness was asked by counsel for the plaintiff to indicate on a plat if there were any excavations or depressions made by the removal of the old sidewalk, and if so
16 where they were and to describe them to the jury. Thereupon counsel for the defendant objected that the question ought to be confined to the condition of the said sidewalk at the time of the accident. And thereupon the court inquired of counsel for the plaintiff: "Do you mean the depressions that were talked of in regard to this accident?" to which inquiry the counsel for the plaintiff responded in the affirmative; and thereupon the court overruled the said objection of counsel for the District of Columbia, and counsel for the District of Columbia then and there duly excepted to said ruling of the court.

And thereupon the witness answered: "There was a depression of four or five feet to the West of the tree, consisting of a hole of about two or three inches deep and about two or three feet wide; to the East and West the said hole was about a foot and a half or two feet wide and had been filled up since.

And thereupon the witness further testified that he did not know how this depression was made, and did not remember when the depression was made, because it was there when witness first came there; that he could not say that the depression was made by the removal of the old bricks, but to the best of his knowledge that depression was there before they started the new sidewalk; that when the new sidewalk was laid the bricks were taken out, probably about a foot, and left that way for quite a length of time, for about
17 two or three weeks, to the best of witness' knowledge. And thereupon the witness repeated twice that the said bricks were left out of that place two or three weeks. In response to an inquiry made by counsel for the plaintiff whether the witness knew when Mrs. Dietrich was injured or fell at that point, the witness replied that in August he heard that a lady had fallen there one Saturday night, and that those bricks, to the best of witness' knowledge and belief, were out at that time, but that he does not know how long that was after the new sidewalk was laid. And thereupon counsel for the plaintiff inquired of the witness if he had any idea how long after he learned that that lady fell that Saturday night and hurt herself it was before the bricks were replaced and the parking joined up to the new sidewalk, and the witness answered three or four days, to the best of his belief.

Witness further testified that people going North and South on 4th street will cut through this space covered with brick pavement and pass generally between the tree and fence. On cross examination the witness testified that he was in his place on the evening of the accident; that there is a lamp over the doorway of his saloon with four Welsbach burners of one hundred candle power each which were lighted that night. In response to a question whether this lamp was lighted at half past ten the witness answered, yes, and that the lamp was lighted up to two or three minutes of twelve o'clock, and said witness also described the lights inside of his saloon and said that the lights from his place reach the point of the accident, and fifteen feet beyond it, clear to the curb on the K street and Fourth street sides.

The examination of said witness being concluded, Howard Dixon Lowd was produced as a witness on behalf of the plaintiff and testified that he was walking with the witness C. E. Dietrich at the time of the accident and that he was about twenty-five or thirty feet in advance of the plaintiff, Mr. Hann, and Mrs. Lowd, who were together behind him; that he did not see the place at which the plaintiff was injured that night, but saw it the next day, in the forenoon about ten o'clock when he examined the place, but not thoroughly, but he looked at it and saw it. And thereupon counsel for the plaintiff asked the witness to describe to the jury as nearly as he could the character

To and from K. street

of the place he examined the next day as the place where the
18 plaintiff was hurt, to which question counsel for the District of Columbia then and there objected, on the ground that there was no testimony to show that the conditions were the same at the different times mentioned; but the court overruled the said objection. And thereupon counsel for the District of Columbia duly excepted to the ruling of the court.

The said witness then proceeded to state that the brick walk there was about two inches lower than the new sidewalk, and was evidently in course of repair; that at the place where the plaintiff stumbled and fell there were no bricks at all, making a depression of four or five or perhaps six inches below the level of the new sidewalk; that it was a ragged place, the widest part of which the witness thought was perhaps fifteen or eighteen inches; that the plaintiff must have crossed at the center, and that the bricks were removed from the corner of the fence to the sidewalk on 4th street to some extent, and that none of them had been joined up close to the sidewalk; that the plaintiff was injured about five feet from where the tree stood.

On cross examination the witness stated that the point where the plaintiff fell was between 15 and 18 inches in width.

The examination of said witness being concluded Henry Massey was produced as a witness on behalf of the plaintiff and testi-
19 fied that he was employed summer before last in selling clams, and that the best part of his time he was down at 4th and K streets northwest; that at the time they were working there laying the cement sidewalk he was not making a permanent stand, because he could not stand there; that he was selling up and down, passing backwards and forwards; that between the tree and fence coming from the yard to the concrete the place was in pretty bad condition; right between the tree and fence was the worst part of it, and the witness supposed from the top of the concrete to where the bricks were missing was about that depth (indicating), as near as witness could come at it without a measure; that there were some bricks out, but witness did not take any particular account of that, but knew there were some out right about between the tree and the fence. That he was there the evening this lady fell, and those bricks were out at that time; they remained out until they came there and fixed up the place——the bricks entirely. That they stayed out until they came there; the head of it, whoever they were, came there and raised the pavement up even with the concrete; that this was done before the accident; that it was done some time——that witness could not specify the time, what time it was, but that it was sometime after it was done, the concrete was laid there some time before; that at the time of the accident the brick pavement was in very bad condition

because it was unlevel, and then there was a hole there, the witness stated, where there were some bricks missing.

20 The witness stated that when the lady was hurt, he was sitting by the side of a tree with his back up against it—with his cart standing in front of him.

On cross examination the witness testified that he had been sitting with his back to the tree at the curb off and on all the evening; that he could not exactly tell whether the gas lamps were lighted, but does not think they were, that they were lit up and repeated that the street lights were lit up, but there was not light enough to serve claims which require more light than gas light or star light; that he did not go to the place of the accident where this lady fell on the evening of the accident. On being asked whether he had examined that place before or after the accident, witness answered: "Well, time and time again in passing over it, going to McDevitt's from my cart, I would go in sometimes to get change, I would notice that change because I was very careful for fear that I might fall my own self. I am sort of near sighted; but I did not make a thorough examination of it, I did not." Witness further said that he never did make a thorough examination more than just taking notice of it in passing over it.

Witness did not remember whether the lights on McDevitt's
21 saloon were lighted that night or not, because some nights it seemed like there was something the matter with his step-ladder; then witness said: "I don't know." McDevitt would not light up every night prompt on the same time. Some nights he would be rather late in lighting it. Then it would be perfectly dark on the crossing at that corner.

The examination of said witness being concluded, George Lindsay Green was produced as a witness on behalf of the plaintiff and testified that summer before last he was working for McDevitt at No. 400 K street; that he was working there when the brick sidewalk was torn up and the new cement sidewalk laid; that when the new sidewalk was laid, of course the new sidewalk was left higher than the brick, and left considerably higher, until the tops of the bricks came about underneath the base of the cement, as far as witness could get at it; that of course they dug up one brick, a long brick, probably, and did not put it back, and the next one was a short one, and the next a long one, and just so that they took enough out; "and as for bringing them back, they didn't do it. That's all I can tell, they didn't do it, and they left them off from the new sidewalk." Thereupon counsel for the plaintiff inquired of the witness how long the sidewalk remained in that condition, leaving the bricks out, and the witness answered: "I don't exactly know, because everything, to my judgment, was cleared away, was taken away from there, lamps and everything

was removed, and there was nothing there to show any danger at all, and there was nothing at all, about, to indicate any danger, and I couldn't tell you, probably a week——nearly a week——or two or three days; I never noticed the time." That it was in that condition when the woman was hurt, and that he worked there all that summer, every morning.

On cross examination the witness stated that he did not see
22 the plaintiff hurt; that he heard that a lady had fallen there at that point where he had just spoken about; that he heard it on a Monday morning, if his memory is right, that he knew what the condition of the pavement was at the time this lady was hurt and at that time the bricks were out, and it was not fixed up until after the lady was hurt.

And thereupon on redirect examination counsel for the plaintiff stated that he had inadvertently omitted to ask a question of the witness, and propounded the inquiry to the witness whether he had seen, or knew of, anybody else falling over this place during the summer while these bricks were left in this condition; and thereupon the witness answered "Yes. Of course I don't know the names of the people, but I have seen people. Of course I was standing in front of McDevitt's place, and I seen one night they were coming along there, and it was quite a little dark in there, and they fell on this place here. Of course those trees——the tree takes the shade of that lamp across the street, and the further side you can't see. Of course I seen a lady and gentleman walking along there, and one of them fell. The lady only fell about down to her knees, and the gentleman catched her up, and said: 'It's a wonder they don't fix that place;' and then they went on. I seen that myself. And then of course there was others in the summer there."

And thereupon counsel for the plaintiff asked the witness: "Did you know any of the people who stumbled there?" And the witness answered: "No, I only knowed one, and he is dead; that is Clarence Chase: He stumbled over there. He is dead."

23 And thereupon on re-cross examination the witness said that the said man stumbled after the new cement walk was put down, at night, but that witness did not know that himself, for, as he had said, "I didn't see him. It was reported the next morning."

And thereupon counsel for the defendant moved to strike out the testimony of the witness respecting the stumbling of the said man, and the court granted said motion.

Witness further stated that a lady stumbled there about six or seven o'clock, directly after the new sidewalk was laid, somewhere about along the same time, he supposed, that the plaintiff received her injury. That this lady was going North between the tree and the

iron fence, and stumbled at that point; that witness was standing on McDevitt's porch; that witness did not see her when she stumbled, saw her body, she was dressed in black; that he seen her stumble right at that point, but did not see her foot strike the cement. Thereupon the following questions were asked and answered as follows:

"Q. What did you see to cause her to stumble?

A. She went down on her knees; that is all I know about it. I didn't go over to see.

Q. You did not see?

A. I did not go over there to see what she stumbled over, but she stumbled at that point."

Thereupon witness further testified that he had seen men come along there and had seen men stumble; that as far as that goes, he would not count himself, that he has stumbled over that him-
24 self, that he stumbled over it that same night, and that he knew that it was there, but forgot it.

Thereupon witness was questioned and answered as follows:

"Q. Did you see any one of these persons when they stumbled?

A. Did I see them when they stumbled?

Q. Yes,

A. All I can tell you is that I know they stumbled.

Q. Did you see the foot of anyone of those persons strike anything to cause them to stumble?

A. No sir; I seen them stumble at that point; that is all I know."

And thereupon Henry Massey, heretofore produced as a witness on behalf of the plaintiff was recalled and upon further examination by counsel for the plaintiff stated that before the time of this accident and after this pavement was laid he saw a lady stumble there, over this hole in the day time, walking from 4th street up K; that she stumbled and stumped her foot and stopped and rubbed. Who she was the witness did not know and said: "that is the onliest one I saw. She is the lady I told you about the other night." That he saw her foot strike the concrete where it was higher than the bricks. "That is a right bad corner, anyhow, in the way of water standing; in time of a rain there is water there." And said witness was asked: "Was that hole in the place where the people passed?" and answered "Yes sir."

And thereupon on further cross examination the witness stated that the place where the water stood was not the place where
25 the bricks were out at the time of this accident, and that he saw a lady stumble there in the noon-daytime; and being asked what month it was, witness said: "I think it was in the month of August," but he could not tell what time in the month, because he did not give that much attention to it; and being asked, "What year

was it in," he answered that it was in the year sixty-four, and he asked, "isn't this year sixty-four," and was told that this was the year 1903, and was asked whether the stumbling of the lady was in 1903.

Thereupon counsel for defendant, having previously given notice of the motion to strike out the testimony of the witness George Lindsay Green respecting the alleged accidents occurring at the said place, excepting the occurrence in which he stumbled himself, renewed his said motion on the grounds that the witness did not see the said several stumblings, (and on the further ground that it was not sufficiently shown that the said stumblings had occurred previously to the accident of the plaintiff, and at the place of the said accident); but the court overruled the same motion, and thereupon counsel for the defendent duly excepted to the ruling of the court.

The examination of said witness Green, being concluded, the plaintiff called Roland F. Hann, who testified in substance respecting the condition of the said sidewalk at the time of the accident as hereinbefore and hereinafter stated, and who stated an cross examination McDevitt's saloon was open the night of the accident but that he would not say the light was a good light, that the light on the corner of the building seemed to be very dim, that on the night of the accident this lamp was lighted, but how many burners it had he did not know.

That he examined the place of accident next day.

26 At the place of the accident there was a general depression that reached up towards the saloon, and then back nearer the new sidewalk. Right in this depression next to the cement sidewalk, the bricks had been left out along the edge of the new walk, leaving a place six (6) or seven (7) inches deep. That the condition of the light was very poor at the place of accident; that the place was shaded, and that the trees there almost overlapped.

There was nothing in the way of lights or barricades to show that the place was dangerous.

Noticed a depression of some kind that night. Did not see that the bricks were out. It was dark at the place of accident, could not see whether it was a brick sidewalk or a cement sidewalk.

He was walking on one side of Mrs. Dietrich and they were walking in the ordinary way when the accident occurred.

Subsequently the witness said that he could not say whether McDevitt's light was burning or not.

The examination of said witness being concluded, the plaintiff was produced as a witness on her own behalf, and testified that between 9:30 and 10 o'clock p. m., on the 2d day of August 1902, she was walking along the South side of K street, going Eastwardly, with

Mrs. Lowd and Mr. Hann, and that her husband and Mr. Lowd were ahead of them. Witness testified that the party were walking along ordinarily, and that when they went to cross over diagonally across the parking, that suddenly she felt her foot go *down*, her right foot,
and the ball of her foot struck an uneven surface and bent
27 under her; that she felt as if something had snapped around
her ankle, and that first she thought her ankle was broken; that she had not previously to that time suffered any lameness or injury to that ankle; that her husband was about 25 or 30 feet ahead of her at that time, as far as she could judge, and that she had to call him back; that it was dark; the place was in such condition that unless you were looking for something of the kind you would not see it; that it struck witness as being dark at that place, because while witness knew that the fence was on one side and the tree on the other, still, she could not have distinguished any object there that night; that she did not know of the existence of this place previous to the accident; that she had been there during the early part of March, when there was a heavy snow, the first part of March or the latter part of February; there were no barriers or anything to indicate the existence of the place, nothing there but the hole, which she knew was there, because she went down in it. There were no lights around the place. That that night, after she twisted her ankle, she felt the most intense pain; so that as they were taking her home she felt as though she was going in a trance and she could feel the pain to the end of her fingers; never had such agony in her life; that Mr. Hann and Mr. Lowd held her up and helped her home so as to keep the weight from her foot; that she lived at that time at No. 106 I street, Northwest. That her foot swelled as big as her head, and the veins were all broken, and you could see the blood in them. That the doctor bandaged her foot, and the bandaging relieved the swelling to a certain extent; that the swelling continued to any extent three or four months, and that her ankle is not now
much swollen, but is still puffed around the ankle. That she
28 was in her bed about six weeks, and in her room longer than
that. That at the time of the accident she was employed at Rich's shoe store, earning thirty-five dollars per month. That she is thirty-six years old. That she was prevented from returning to her work by her injury until about the first of December, when she went back, but not to active work; that she sat in her chair; that her position is that of manager of the children's department, and that she could sit and write her letters and direct the clerks without having to make any exertion. That she worked that way for a day or two, and that her foot would then give her so much agony that she would have to go home and stay two or three days. That during the time

she sat in a chair in the store she would have to have her foot elevated to keep the blood from running down into it. That she was prevented from waiting on customers for about two months after she went back to work, when she was then called upon to do active duty. That during the two months before she was called to active duty she lost on the average two days a week; that after she was called to active work she lost about $1.50 a week, because she suffered so much pain in that limb that she could not work. That form the time of the injury to the time she returned to work in December she suffered intense pain, so that she had to send for a doctor at night to give her a hypodermic. That since her return to work she had to go to see Dr. Chadwick about every two weeks or so; that
29 she is still under the doctor's care; that since she was called to active work the doctor has only been to see her a few times; that she was able to go to his office and is still under his care; that about the middle of November, after the injury, her physician advised her to use a rubber stocking, which she did, and up to that time, her foot had been bandaged with adhesive bandages. That she wore that elastic stocking up to a month or so ago; that instead of using that elastic stocking since then she has used an ankle supporter made out of cloth with whalebone in it, under the advice of her physician. That she never saw the depression that she stepped into. That her ankle is stiff; that the movement that is most seriously impaired is the motion up and down of the muscles, and that between August 2, 1902, and the first part of December following, she did not earn anything, and lost $35 a month between those dates. At the present time she still loses about an average of a day in a week. That at times between August 2, 1902, and the first part of December, 1902, she could not sleep at all; that since she went back to work sometimes she cannot sleep at all, and if her foot gets in a certain position in the bed where it touches the covers, it wakes her up, and feels as if something were sticking into the bone.

On cross examination the witness stated that after her limb was bandaged the directions were given to her not to put any weight on it at all; that she was not told to use the limb moderately until the inflamation should go out of the joint, that she was instructed that she could use the limb with the aid of crutches, but not to put
30 her weight on it; that she was on two crutches until the latter part of January, and then she went on one crutch, and laid that aside about two months ago, and since then she has used a cane; that she waits on customers in the store; that the first couple of weeks after her return to work she did not wait on customers, but would see that they were waited on; that that is her business, and when they are very busy at the store witness has to wait on customers

herself. That she put the elastic stocking on sometime in November, 1902. That she could not tell exactly how much she lost in the month of November last, but she guesses on an average of five dollars.

The examination of the said witness being concluded, Dr.
31 Dewitt C. Chadwick was produced as a witness on behalf of the plaintiff, and testified that he had been a practicing physician in general practice for eight years, and has known the plaintiff about six or seven years, and attended her as a physician nearly that length of time; that he was called to treat her for an injury to her right ankle in the first part of August, 1902; that the injury was a sprain to the ankle joint, and it had occurred some time before he saw her, and the joint was very much swollen, and there was a great deal of pain, and the joint in fact was so much swollen that examination as to whether there were any broken bones or not could not be made. That the witness dressed it just as he would a fracture, so that in case there were any broken bones it would be properly treated. That the ankle joint was, witness supposes, three times its normal size, as large as that around the ankle (indicating); that the swelling extended up the leg two-thirds of the way to the knee, as he remembers it, and it was extremely painful, and the patient had to have hypodermics to quiet her pain, and after treating it some time the swelling went down and he did not make out any broken bones, but the ligaments all seemed to be stretched and torn, and there was a great deal of bleeding into the joint. That it was what is commonly called a bad sprain. The injury was followed by synovitis; that is, an inflamation of the synovial membranes of the joint, and there was a great deal of fluid, and it was some months in getting the swelling reduced. That witness treated her steadily, except
32 with an intermission when he was on a vacation, until the latter part of December, 1902; that he treated her daily, and was called in the night frequently to relieve her suffering; that the dressings would be painful, and had to be removed; that during that time she suffered a great deal; that since the latter part of December, 1902, witness had only treated the plaintiff when she came to his office; that she would come there on crutches, and the joint would be examined, and sometimes dressed, and sometimes applications put on it. That he last examined the limb on the 4th of November last; that its condition at that time was that it seemed to be very sore on examination, and it hurt her a great deal, pained her to stand on it. She came in with a crutch or a cane, limping a great deal, and the joint was still weak and some swelling there; that respecting the utility of the limb between August 2, 1902, and the latter part of December, 1902, it was practically totally disabled, that she could not use it; that witness gave plaintiff orders to stay in bed

most of the time; that he could not say how long the plaintiff was unable to perform her ordinary duties on account of the injury; that he does not remember; that it was some time. Thereupon the following questions were asked and answers made by the witness:

"Q. Now, doctor, as to the permanent effects or character of this injury, what have you to say?

A. Well, I can only give you an opinion. It would take time, of course, to tell that. The joint is affected, if it is like I saw it on the 4th of November; it is weak, and the ligaments are loose, and there is pain and swelling—synovitis, probably chronic syno-
33 vitis, and of course if that persists, she is going to be permanently disabled. I should rather expect the joint to be permanently disabled.

Q. And is that your opinion?

A. Yes sir, that is my opinion."

And the witness further testified that since the latter part of December, 1902, down to November 4, 1903, whenever witness had been called in or the plaintiff had been to see witness, she, the plaintiff, had been to see witness, she, the plaintiff, complained of suffering a great deal, and so far as he could tell she did suffer; that she walked with a great deal of difficulty, hobbled along with crutches at first, and afterwards with a cane, and it seemed to pain her to put any weight on the joint; that, taking into consideration the character of such injuries, the witness stated the pain was very acute, that most of the time the witness saw the plaintiff she was suffering, and a great many times she required drugs to relieve her pain; that he was called in a great many times in the night to relieve her. That the last time he saw her she suffered to the extent that she suffered then when she would walk on it, or if witness would take it and examine it, if he would manipulate the joint at all, it would hurt her and she would flinch from any examination that would be made; and then of course the swelling was there, the chronic synovitis, as he would call it. The witness was then asked from what he knew of the character of this injury and the particular nature of this special case, what would be his opinion as to her future suffering from the injury, and replied that the joint would be disabled; that whether the plaintiff would suffer pain or not he could not say; that any exertion, or
34 a slight wrench of the joint, would tend to bring back the old trouble; that any joint injured at all, even slightly, is more prone to be injured than one that has never had an injury, and that one injured as witness understands hers was, would be very easily affected again; that a slight wrench would set up an actue inflamation, in his opinion. That witness dressed the injury himself and put on a plaster dressing, meaning thereby an adhesive plaster,

which has the same effect as a cast would have, so that the joint was absolutely immovable; that the witness did that until the swelling decreased, a number of times, and that he had to put her to bed a part of the time, when applications, hot applications, were put on the ankle, and since then witness has advised her to get an elastic stocking, which he thinks she is wearing, or ought to be wearing, if she is following his instructions, a specially made leather bandage; that he is not certain whether he prescribed that stocking for the plaintiff the last time he saw her, or the previous visit, but the last time he saw her he found it necessary for her to wear something of that kind.

Upon cross examination the witness testified that this injury was a badly sprained ankle; that he had seen many such; that there was nothing about this case that struck him as exceptional except its severity; that it seemed to be worse than the ordinary case of sprain, and it was longer in recovering, and yielded to treatment more slowly; that is to say, the immediate effects seemed to con-
35 tinue longer, and they were more intense at the beginning, the swelling was so great and the apparent rupture of ligaments so extensive. That witness could not state how long the leg up to the knee was rendered immovable by the application of adhesive straps, which had the same effect as a plaster of paris cast would have had; that would depend, of course, on the condition of the leg; that he was seeing her every day, and took that off and readjusted it from time to time, but could not state how many times he did that; that if the dressing would remain like that, comfortable, he would usually keep it in place for two weeks, until enough of the swelling had gone down to render the dressing loose, and then he would put on another one. That then he went away on his summer vacation the latter part of August and part of September and was gone about two weeks. That on his first visit after his return he found the plaintiff in bed; that Dr. Stewart had been attending her in the meantime; that then he attended the plaintiff almost daily until some time in December; that before he ceased his daily attendance the plaintiff had been able to move about her room with crutches; that she could not walk on the joint, on the foot; that when she came to his office she came on crutches; that she never came to his office without some support, either crutches or a cane, but he could not give the exact date when she first came without crutches; that he does not think it has been more than six months, and that she came with a cane at that time. That he saw her on other occasions
36 than those when she came to his office after December; that he would be called to the house at intervals when she was suffering; that he remembers on one occasion seeing her on the street, and that he may have seen her more times than that on

the street; that was in front of her house where she was then living; that must have been about six or eight months ago, and he may have seen her on the street at other times, but he does not remember. Thereupon the witness was asked this question:

"Q. Do you know of any reason why this injury will not yield to the treatment that you have prescribed?"

And answered:

"A. Well, such cases usually, if they get well at all, require a great deal of time. A joint does not recover in a few months. You would naturally suppose that it would remain permanently injured. There is a thickening of the tissues which takes place in that time that renders them abnormal. Of course they never become normal tissues again."

Witness was then asked whether he found anything in his examination made on November 4th that indicated that there would be no recovery, and answered:

"A. Well, she had synovitis; of course a synovitis running on for a year and a half would be pretty apt to be called chronic in that time. The synovial membrane and cartilages would become thickened, and scar tissue would form there that would never be obsorbed. That would tend to weaken the joint, and would tend to make the motion more or less limited, and of course permanently dis-
37 able the joint."

That the effect of walking upon an injured joint is that it would tend to excite an acute inflamation; that a joint is very easily injured again that has once been injured, especially where it has been severely injured; that plaintiff should have used this limb in standing or walking upon it after December, 1902, moderately, so as to get back as much of the normal motion of the joint as she could, and yet not severely enough to excite a new inflamation. That in his inspection of the limb after January, 1902, subsequent to the original inflamation, he did not find any unusual inflamation, and that he never noticed any new inflamation start up after the plaintiff got about; that at times it would be more painful than at others, and there was always some swelling there, and it has always been his experience that those swellings disappear better if the joint is not used; that the elastic stocking is a common and usual device prescribed for needed support, but still will allow the use of the joint; that he advised the use of that stocking by the plaintiff in January or February, 1903, but whether she wore it all the time the witness does not know, and the last time he saw her he advised her to wear a leather appliance that just fitted over the ankle alone. That he thought that would give the ankle more support, and it would not be necessary to wear a stocking as long as an elastic stocking; that

the leather stocking was prescribed in November, this last
38 year, when witness knew that this case was within call; that witness has a memorandum which will show his calls, but did not have it with him, but would give a memorandum to counsel for the defendant. That he saw the ankle a number of times at intervals between December and April of this year, but he has not been seeing the plaintiff much since that time; that during the past summer he has seen her very little; that all the treatment she is now taking is to wear that appliance for the ankle; that she is not under any direct treatment; that he advised plaintiff to bathe her foot frequently in hot water, to soak it in hot water at night, to rub it with alcohol, and to put on this applicance, and that is about all witness supposes she is doing now, unless she is under somebody else's care. And thereupon the witness was asked the following questions and made the following answers thereto:

"Q. You do not say that this lady will not recover from that injury, do you?

A. I would not say that she would not. I say my opinion is that she will always have a weak joint. With the most favorable circumstances that joint will always be weak, certainly for a long time.

Q. And that is based upon the examination that you have narrated to the jury—that opinion?

A. On the examinaton and on my knowledge of similar injuries in other people."

Witness further testified that he has seen such a case where the party recovered the use of the limb, but they have to be extremely careful with it, or the slightest wrench will bring on another sprain; that you could injure a normal limb, but that you could injure a weakened limb much more easily. That there is more or
39 less stiffness about it, and it is weak.

The examination of said witness being concluded, Dr. James Stewart was produced as a witness on behalf of the plaintiff and testified that he is a physician and has been in general practice about eleven years and has known the plaintiff for some years, and saw her after Dr. Chadwick was out of town from the 10th of August to the 23d of August, 1902, for two weeks. That she had at that time an inflamed ankle joint, due to a severe injury of some kind, a wrench, probably; that when he first saw her the joint was very much inflamed, and there was a good deal of fluid in the synovial joint itself, the foot was painful and swollen, and the tissues all around the joint were inflamed and torn, the tendons were torn; he could not make out any fracture; the limb was swollen considerably; it was much larger than the other joint. The effect of the fluid mentioned in the joint makes the joint painful and prevents motion without pain;

that the ligaments in an injury of that character are nearly always torn in as severe an injury as the plaintiff received, and in this case they were evidently torn; that witness could not make out any fracture of the bone at all, but the ligaments were evidently torn, that is, the tendons themselves were torn, and following that injury there were inflamatory tissues thrown out around the injury. The effect of that upon the ankle joint is that it weakens the joint, makes it a weak joint, and there is more or less inflammatory tissue thrown around, which contracts and interferes with the movement
40 of the joint; that it is witness' opinion that the plaintiff suffered intense pain during the time that he saw her. That after Dr. Chadwick's return witness saw the plaintiff once or twice; from time to time he would see her; once or twice, he thinks, with Dr. Chadwick; that it was always an inflamed joint when he saw it, and it had not recovered. That during the two weeks he treated the plaintiff it was impossible for her to use the limb at that time at all; that when he last examined the limb it was impaired, but not to the extent it was at first, of course, that the inflamation had subsided to a certain extent, and there was not as much fluid there, and not as much pain. Witness further testified that he examined the joint today, and found that the joint is still damaged; there is some chronic synovitis there, with a small amount of fluid, not so very much in the joint, and there is some thickening around the joint; that she has not a free movement of the joint, and it causes her pain to move the joint; the movement is impaired. And thereupon witness was asked the following question and gave in response thereto the following answer;

"Q. Knowing what you do about the character of this particular injury that Mrs. Dietrich sustained, and your knowledge of the character of such injuries, what is your opinion as to its permanency?

A. Well, my opinion is that the joint will never be like it was originally; it will be a weak joint and it will give her considerable pain from time to time, in my opinion."

And the witness further testified that such an injury is much more painful than a fracture of the bone.

Upon cross examination the witness stated that he did not
41 know when he next saw the plaintiff after the return of Dr. Chadwick; he turned the case over to him when he came back; he saw her some time in November, 1902; he called at her house to see her; that he knows that he saw her once or twice, probably twice, but does not know when the second time was, but there was a considerable period of time between those visits; but that he administered no treatment when he called upon her on those two occasions, but examined the ankle once. That the condition of the ankle at that time compared to its condition when he ceased to visit her in the

latter part of August was that it was not so swollen; still it was painful, and she was unable to use it. That on a subsequent visit when he saw her she was hobbling about, using a crutch; that on his examination made to-day he finds the extent of the impairment of the joint to be that there is more or less stiffening of the joint, and the plaintiff cannot move it without pain; but the joint is not absolutely fixed, and she has partial movement of the joint; it is considerably impaired; she cannot move it back and forth like that (indicating); that it is a movement called a hinge movement.

The plaintiff by her attorney here announced that she had no other or further testimony to give to prove the issues upon her part joined, and rested, and the above being all of the testimony offered or given on her behalf, the defendant, The District of Columbia, thereupon produced Dr. J. Ford Thompson as a witness on its behalf, and

42 he testified that he was a practicing physician and surgeon, and had been practicing surgery for about thirty years and had made a specialty of such practice, and that he had seen a great many cases of sprained ankle; that in a severe sprain of the ankle, as in a severe sprain of any other joint, there is usually considerable swelling about the articulation, and sometimes it is accompanied with effusion into the joint itself. And thereupon the witness was asked the following question:

"Q. Suppose the case of a lady in good health about thirty-six years of age who struck her right foot violently upon a brick or some other substance, wrenching the foot, turning the ankle, and falling to the ground, who was assisted to her home, a distance of a couple of squares, by the aid of persons, she leaning upon their shoulders, and the limb then being very much swollen; and the limb then being treated with hot water and adhesive plaster in order to stiffen it, the party in the meantime suffering considerable pain, what would you say as to the probabilities of such an injury being of a permanent character?"

Said question being objected to on the ground that it did not state all of the testimony, and on the ground that it was not based upon the effusion that the doctor had spoken of in the joint, and that it had not stated that the plaintiff struck the ball of her foot when she stepped down, causing her to twist with her entire weight, and turning to the right, the said question was amended by adding the following:

"Q. Assuming that as the statement of the case as to the injury, Doctor, and that when the party was taken to her home the ankle joint was swollen to three times its normal size, and that the swelling extended up the leg two-thirds of the way to the knee, and was extremely painful, and the ligaments seemed to be stretched, and torn, and there was a great deal of bleeding into the joint,

what is commonly called a bad sprain, and injury was followed by synovitis, and there was a great deal of fluid, and it was some
43 months in getting the swelling reduced, that there was inflammation of the synovial membrane there also; that there was a bleeding into the joint, commonly called a bad sprain, that the injury was followed by synovitis, that is an inflammation of the synovial membrane of the joint; there was a great deal of fluid, some fluid, and that the physician was some months in getting the swelling reduced, and that this synovitis had become chronic, what would you say as to whether such an injury was a permanent injury?"

Thereupon the witness testified that he should say that it ought not to be a permanent injury, simply for the reason that it ought to be cured; that it rarely happens that a sprain is permanent unless it has been neglected in some way, or that there is some peculiarity on the part of the patient; you may take a rheumatic patient or a gouty patient, sometimes with a sprain, of the ankle joint, especially, and it is very persistent, but he does not think he has ever seen a case that was not cured if it was treated properly. And thereupon the witness was asked what he would have to say as to the fact that the injury occurred in August of 1902, and that the injured lady still has more or less sensitiveness about the joint and the limb, and stiffness, at the present time, and he replied that he should say that such a condition persisting for that length of time was a very unusual one in a case of sprain. And thereupon the witness was asked what he would say as to the probability of the permanence of the injury under those conditions, and answered: "It depends altogether upon whether there is some peculiarity of the case. As I say, as a general rule they are cured. It may be that if inflamation should be excessive, and there has been unusual movement allowed, of the joint,
44 that some adhesions may take place around the joint and that might cause distress to the patient for a good long time, but in my experience such a result is very unusual."

And thereupon, in response to an inquiry by the court, the witness testified that an injured joint, a sprained joint, ordinarily recovers. The witness further testified that synovitis is an inflamation of the lining membrane of the joint. That membrane is called the synovial membrane, and the inflamation is synovitis. That chronic synovitis is exceedingly uncommon from an accident. Most frequently—it is very common as a tubercular disease, some disease that involves the joints, and having some general or constitutional cause. Acute synovitis frequently results from injury. Occasionally such a condition might become chronic if the parts have not been properly treated, or affected in any way, or there has been too much

motion, or something of that kind; it might become chronic. The synovial membrane may become thickened, but the cartilage does not become thickened. That scar tissue is not formed that will never be absorbed, in synovitis that has not been opened, for instance, and ruptured through. Then of course it heals and formes a cicatrix and that you call cicatrical thickening; and there may be a thickening from any affection of the membrane, and that might be described as cicatricial, but still that is not a very proper word to use in such a connection. That in a case such as that stated in the hypothetical question heretofore put to witness, such cases do recover and should recover, and they usually do recover. That a sprain of the
45 ankle joint is one of the commonest injuries in surgery; that the witness has seen hundreds of them, he supposes, and cannot recall a case in all his experience that has not recovered. Something might have happened not described, whereby chronic inflamation might set up, and give rise to these adhesions, and interfere with the free motion of the joints and give pain for an indefinite length of time, but it is very seldom you have those cases. That witness has had those cases, and continued for a long time, but never one that did not get well. That in the case supposed in the first question, supposing that the patient was confined to her house from the third day of August, 1902, to the first day of December, 1902, then losing two days per week, that in the latter part of January, 1903, she went about on two crutches, and from then on with one crutch, until two months ago, wearing, from November, 1902, until a month ago, an elastic stocking, working in a store during all that period from the latter part of December, 1902, up to the present time; that she can now move her foot up and down to some extent, but not laterally without pain, he would say that while he does not know anything about the peculiarities of this case, if there are any, such cases of sprain ought to recover, and that he gives it as his general opinion that such a condition should be curable; that surgery would be a very sad life if sprains were not curable. The witness further testified that this case is all about a sprain of the ankle joint; it does not say anything about the foot or the instep, which is an entirely different thing. This is simply of the ankle joint.

46 On cross examination the witness testified that a great deal of bleeding into a joint would indicate that the sprain was a very bad one, but that the ligaments are more or less lacerated and torn in any bad case of sprain; that the tearing of the ligaments indicates a bad sprain, of course, as well as the laceration or tearing of the ligaments and bleeding into the joint followed by intense swelling which is not relieved for some months, all of which would indicate a bad sprain, and that the degree of inflamation within the

synovial membranes or within the joint, including this swelling, would indicate a bad sprain; but at the same time, the witness stated that it is exceedingly difficult to tell whether the joint is filled with blood from a sprain or not; that if after the expiration of a year and a half, the ankle joint was found still swollen, and there was still existing in the joint a synovial fluid, with an enlargement of the tissues about the joint, that would indicate that the sprain had been a bad one, and that the patient was still suffering from it. And thereupon the witness was asked what that would indicate as to the possibilities of her future suffering from it, after this lapse of time, and answered that it would indicate that it would be impossible for a doctor to tell, or to put a limit to the recovery of such a case, although it ought to be curable; and that he cannot say that he would expect it to be a permanent injury because witness had not seen a case of mere sprain that was permanent; but he could not fix any limit when there might be a permanent cure, after a year and
47 a half with the patient still suffering, that it would be very difficult to fix any limit; and if the joint is injured so severely from a sprain that a year and three months afterwards, from August 2, to November, as described, the patient is still suffering he would still say that such cases ought to be curable by massage and proper treatment; that he hardly knows of any condition there that ought to be permanent, although it is possible that such a condition might be. Thereupon the witness was asked the following question and answered as follows:

"Q. Is it possible?

A. Yes, if the parts have been unusually inflamed and adhesions resulted of course it is impossible to express an opinion."

And the witness was further asked and answered as follows:

"Q. And would these conditions indicated in the question show such a condition as could possibly produce a permanent injury?

A. Well, about as near as any case I could well imagine."

Thereupon, upon re-direct examination, the witness testified that such a condition would not probably result in a permanent injury; that he had never seen a case in which it did.

And thereupon the defendant rested, and no further evidence being offered on behalf of either of the parties the plaintiff prayed the court to instruct the jury as follows, which said instructions were granted by the court:

"5. A person in passing over the streets or sidewalks in
48 the city of Washington has a right to assume that such portions of the streets or sidewalks as are reserved for the ordinary purposes of travel, are maintained by the defendant in a reasonably safe condition to subserve the purposes of such travel;

and he is not required to be on the lookout for pitfalls, defects or unsafe conditions in such portion of said streets and sidewalks.

6. A person in passing over the sidewalks of the city has a right to assume that they are in a reasonably safe condition and to regulate his conduct upon that assumption, and the degree of care and caution which the plaintiff was bound to exercise was such as a person of ordinary care and caution, acting upon the assumption that the sidewalk was in a reasonably safe condition, would have exercised under the circumstances of the case."

"7. If the hole, depression or defect complained of, was of a dangerous character, and if the District had knowledge of the existence of said hole, depression or defect, and failed to take proper precautions within a reasonable time after such knowledge, to repair the same or protect persons passing along K street, against it or warn them of its existence, then the District was guilty of negligence."

"8. If the hole, depression or defect complained of in the declaration was made or caused by the District or its agents, then as a matter of law, the District had notice of the existence of said hole, depression or defect from the time such was made."

49 "9. If the jury find from the evidence that the pavement of the parking in the Southwest corner of 4th and K streets, N. W., had for a long time been continuous with the pavement of the sidewalks of K and Fourth streets, and that the public had been accustomed to use said parking as part of the said sidewalks; and if they further find that the District made or caused to be made a dangerous hole, depression or defect, in any part of the pavement of said parking across which the public was accustomed to pass, or left, or permitted the same to be left, for an unreasonably long time, without anything to protect the public against or warn the public of the existence of such hole, depression or defect; and if they further find that the plaintiff while passing over such portion of said parking and while in the exercise of ordinary care and without notice of the existence of such dangerous hole, depression or defect, was injured as a result of stepping or stumbling into or falling over said hole, depression or defect, then their verdict should be for the plaintiff."

"10. If the jury should find for the plaintiff, they are instructed that in estimating the damages sustained by her, they should take into consideration the character of the injuries sustained, the mental and bodily suffering which they may find to be the direct result of such injuries, and the extent to which such injuries have prevented her from following her ordinary pursuit or employment, and the loss of earnings resulting therefrom. And they may also consider
50 whether the plaintiff's said injury is likely to be permanent and the suffering and inconvenience that may result therefrom in the future."

And thereupon the defendant by its counsel prayed the court to instruct the jury as follows, which said instruction No. 1 was granted, excepting the part marked in brackets, which was refused:

"1. The court instructs the jury that their verdict must be based solely upon the evidence in the case and that their sympathy for the plaintiff should have no influence on their verdict; that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that her injury proximately resulted only from the negligence of the defendant for the mere happening of the accident does not constitute negligence or any presumption of negligence nor is the defendant required to keep its streets absolutely safe and it is not an insurer against accidents, nor was it required as matter of *law* to place barricades or lights about the place where the plaintiff was injured.

[On the question of negligenceof the defendant the jury should consider that at the time of the accident the place where it occurred was
illuminated by the light in front of McDevitt's saloon or any
51 other lights and that adjacent to the parking the sidewalks on
4th street and on K street afforded a reasonably safe way, and if they should so find from the evidence and find from the evidence under all the circumstances that the defendant was not negligent then their verdict should be for the defendant."]

And to the modification of the said prayer, and to the refusal to give the said prayer as requested, the defendant then and there by its counsel, before the jury retired to consider of their verdict, excepted, and the said exception was then and there noted by the Justice presiding on his minutes.

And thereupon counsel for the defendant further requested the court to instruct the jury as follows, which said prayer was granted by the court:

"2. If the jury find from the evidence that the place where the plaintiff was injured was reasonably safe for travellers using due care at the time of the injury complained of in this case, or should find from the evidence that it was not reasonably safe for travellers and that plaintiff received her injury through inattention while not in the exercise of ordinary care in failing to observe and avoid the defects in the sidewalk, if any, then their verdict should be for the defendant."

And thereupon counsel for the defendant prayed the court to further instruct the jury as follows, which said instruction the court
then and there declined to give and rejected the said prayers:
52 "3. The court instructs the jury that there is no sufficient evidence afforded by the witness Green of previous stumbling over the space where bricks were left out between the cement walk and

parking and that the falling of such persons or their stumbling, as described by the witness, excepting his stumble, is not sufficiently shown to have been occasioned by such leaving out of said bricks."

And to which refusal of said prayer the defendant by its counsel then and there duly excepted, and the exception was then and there noted by the Justice presiding on his minutes.

And thereupon counsel, for the defendant requested the court to grant the following prayer, which was granted by the court:

"4. The court instructs the jury that they are entitled to consider the refusal to allow the inspection of the plaintiff's injury as a presumption against the extent of the injury as claimed on behalf of the plaintiff."

And thereupon the court orally charged the jury as follows:

FOURTH DAY.

Gentlemen, there are a few matters which I want to instruct you upon, as has been requested, and to take up the respective prayers which are to govern you in your decision in this case. Of course you understand that the law is given to you by the court as bind-
53 ing upon you. The facts you decide for yourselves; that is your province. This case is brought by the plaintiff against the defendant for its alleged negligence in permitting a hole or depression or whatever you may choose to call it, to exist upon its sidewalk in the city. The plaintiff happens to be a woman. The defendant happens to be the District of Columbia. Now, you have not a thing in the world to do with those facts, so far as the personality of the plaintiff or the defendant is concerned. A woman is entitled to the same law in a case of this kind that a man is; no more or no less. The defendant is entitled to the same law that an indivdual would be; no more, no less. And therefore it is matter of utter indifference to you as jurymen as to whether or not this plaintiff is a woman and this defendant a corporation. That plays no part; you have nothing to do with that. Therefore it is that the court instructs you that your verdict must be based solely on the evidence, and of course in regard to these prayers which I shall give you, you must understand that a prayer must be based on the evidence, and you cannot consider anything outside of the evidence. Your duty is to take the evidence as you have found it, and to apply the law as it is given to you, and the evidence you have heard from the witnesses, and in considering the evidence, you of course are entitled to consider it just as you may other facts that come to your consideration in the ordinary affairs of life. So that your decision, therefore, in this case, must primarily be based upon the evidence. I will not say anything more about that, because I am sure that is a fact you all understand,

and that your sympathy for the plaintiff should have no in-
54 fluence on your verdict. I have said enough to put you on your guard about that, gentleman. Of course you are not to give a verdict based upon sympathy, but to give a verdict based upon the law and the facts.

But on the other hand you are not to be deterred from giving a verdict in this case because it happens to be the District of Columbia which is the defendant, and you possibly may be a tax payer in the District. You have got nothing to do with that. That does not play any part in this case, one way or the other. You are to consider this case without any reference to yourself, that you as a taxpayer might have something to pay if you should give a verdict against the District; or on the other hand that your sympathies are excited because a woman is the plaintiff in this case. All these considerations you must sweep aside, as I am sure you will, and base your verdict entirely upon the evidence as it is presented to you.

Now in this case, as in all other cases, the plaintiff alleges certain things, that is that she was injured, and that her injury was occasioned by a defect in the sidewalk into which she fell or stepped and was injured. That is a question of fact for you. There are two questions of fact. First, was there a defect in the sidewalk; and if so, was that defect the proximate cause of the plaintiff's injury, if you find that she was injured; did the defect cause the injury, in other words, if you find that there was an injury. Those two things are presented at the very outset, and it rests upon the plaintiff to prove both of those facts by the fair weight of testimony,
55 which I have explained to you so much in detail heretofore.

The next inquiry which perhaps presents itself to you is this: What liability has the District of Columbia to keep its sidewalks and so on in repair or reasonably safe condition; what is the liability? Now I should say to you at the start that there is to be no presumption raised that the sidewalk was not reasonably safe simply because an accident happened. The accident does not speak for itself and therefore that does not raise the presumption that there was a defect in the sidewalk. You must go beyond that and prove that there was a defect. Therefore the happening of the accident does not raise any presumption that there was negligence on the part of the defendant in this cause. And we go a step farther, and the law is that a municipality such as this defendant is not an insurer of people who travel over its streets; that is to say that it does not have to keep its streets in such a condition as will absolutely insure the safety of people travelling over them. They are not, in other words, therefore insurers of the safety of people who travel over them, and as it is put in this prayer:

"The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that her injury proximately resulted only from the negligence of the defendant, for the mere happening of the accident does not constitute negligence or any presumption of negligence, nor is the defendant required to keep its streets absolutely safe."

That is as I have explained to you; and it is not an insurer against accidents.

So far we have what the District is not required to do.

56 Now then, what is the right of a person who passes over the streets; what right has that person? This is the law on that subject; I mean in respect to the safety of the streets when persons walk along the sidewalk:

"6. A person in passing over the sidewalks of the city has a right to assume that they are in a reasonably safe condition, and to regulate his conduct upon that assumption, and the degree of care and caution which the plaintiff was bound to exercise was such as a person of ordinary care and caution, acting upon the assumption that the sidewalk was in a reasonably safe condition, would have exercised under the circumstances of the case."

That is to say, gentlemen, that the District of Columbia the defendant in this cause, has the duty thrown upon it to keep its sidewalks in a reasonably safe condition, and therefore a person walking along that sidewalk has only to use such reasonable care and caution as a person ordinarily would in walking along the sidewalk, conscious of the fact that that person was not compelled to look out for pitfalls or anything of that kind, and had the right to assume that the sidewalk was kept in a reasonably safe condition, and with that assumption in view, that person, the passer-by, is on his or her part compelled to take such reasonable precautions in walking along the sidewalk, with this assumption in their minds all the time, that a reasonable person under like circumstances would have taken, as I say, under similar circumstances.

And then you have this instruction:

"7. If the hole, depression or defect complained of, was of

57 a dangerous character, and if the District had knowledge of the existence of said hole, depression or defect, and failed to take proper percautions within a reasonable time after such knowledge, to repair the same or protect persons passing along K street, against it or warn them of its existence, then the District was guilty of negligence."

That is to say, if you find that this was a dangerous defect in the sidewalk, and the District had knowledge that it existed, and that they failed to take proper precautions within a reasonable time after

they knew of it, to repair the same, why then it is guilty of negligence; or if it failed, with the knowledge that it was a dangerous hole, to take some precaution, or afford some protection against accident to persons by falling into it. Now in that connection I will say to you that it is not required as a matter of law to barricade or to put lines about the place where the plaintiff was injured. That is to say, the law does not compel them to put lines about it. The law does not compel them to barricade it. But if you find that it was a dangerous place in the sidewalk, and the District knew of that fact, then whilst the law does not compel them to barricade it, or to put lines there, you as a matter of fact may find that they were negligent if they did not take some sort of proper precautions to prevent people from walking into it. So that it is a matter for you, and while the District is not compelled to do these things, if you find this was a dangerous place and they knew it, then they ought to have taken some precautions—it does not say what—to prevent anybody from walking into it. Therefore it follows, from what has just
58 been said, that:

"If the hole, depression or defect complained of in the declaration was made or caused by the District or its agents then as a matter of law, the District had notice of the existence of said hole, depression or defect, from the time such was made."

That is to say, if this hole or depression, or whatever it is, which is complained of, was made or caused by the District or its agents, then you are to find from that—you can find from that—that the District of Columbia had knowledge of the defect from the time it became a defect, if you find that there was a defect. And therefore:

"If the Jury find from the evidence that the pavement of the parking in the Southwest corner of 4th and K streets N. W., had for a long time been continuous with the pavement of the sidewalks of K and Fourth streets, and that the public had been accustomed to use said parking as part of the said sidewalks; and if they further find that the District made or caused to be made a dangerous hole, depression or defect, in any part of the pavement of said parking across which the public was accustomed to pass, or left, or permitted the same to be left, for an unreasonably long time, without anything to protect the public against or warn the public of the existence of such hole, depression or defect; and if they further find that the plaintiff while passing over such portion of said parking and while in the exercise of ordinary care and without notice of the existence of such dangerous hole, depression or defect, was injured as a result of stepping or stumbling into or falling over said hole, depression or defect,
59 then their verdict should be for the plaintiff."

In other words, that is simply a resume of what I have al-

ready given you as the law applicable to the case.

Also you are instructed that:

"2. If the jury find from the evidence that the place where the plaintiff was injured was reasonably safe for travellers using due care at the time of the injury complained of in this case"—that is if you find that this place was reasonably safe for people using due care walking along the street—"or should find from the evidence that it was not reasonably safe for travellers and that plaintiff received her injury through inattention while not in the exercise of ordinary care in failing to observe and avoid the defects in the sidewalk, if any, then their verdict should be for the defendant."

That is to say, if you find from the evidence in this case that the place was reasonably safe for persons who were using due care as they walked along, and that the accident happened by reason of the want of due care on the part of the plaintiff in this case, your verdict would be for the defendant; or if you find that it was an unreasonable place and that still the accident happened to the plaintiff by reason of her inattention while going along, and not giving the ordinary care that a person would give in walking along the streets, and that the accident happened in that way, from her inattention, then your verdict would have to be for the defendant.

Gentlemen, in passing upon this question you are to con-
60 sider, therefore, whether the defendant has measured up to its duty in keeping the sidewalks reasonably safe for the passing of—or keeping its sidewalks reasonably safe for persons to pass—along the streets, and of course you know that it makes no difference whether they pass along the streets in the day time or the night time, because we all have the right to walk the streets in the night as well as in the day time. Therefore in considering the question you must consider it under all conditions under which people are entitled to use the streets.

Then on the other hand, likewise, you must determine whether or not the plaintiff in this case was using ordinary due care in passing over the street. So that if you find from all the evidence in this case that this was a defect or a depression in the pavement—whatever you choose to call it—and that it had been put there by the defendant or its agents, and you further find that it was a dangerous place and that the plaintiff, while using due care, in the use of ordinary care, stumbled over, or fell into, this place, whatever it was, as the evidence shows—you are to pass upon that—and was injured, then the plaintiff would be entitled to recover. But if she was not using ordinary care, or the place was not a dangerous place, then your verdict would have to be for the defendant.

In passing upon the questions, you have the right to take into con-

sideration the lights that were about, whether there was sufficient light in and about the place, to protect that opening from a person who was using ordinary, reasonable care as they walked along the street. All those things you have got the right to take into
61 consideration in passing upon this question. If you find from the evidence that the place was reasonably well lighted, and that the accident happened not through any deficient light, but happened through the inattention of the person who was going along not giving the ordinary care which a person must give as they walk along, of course your verdict would be for the defendant under those circumstances; but if you find on the other hand that that person was walking along in the way that a person ordinarily walks along, using due care, with the assumption that everything was reasonably safe upon the pavement, and that this place was not reasonably lighted so as put a person who was walking down the street in the position of knowing what was there by the use of reasonable care, and that in spite of those facts she was injured, then of course the plaintiff would be entitled to recover.

There is a prayer that I likewise want to read to you, and to explain. It is your duty to consider all the evidence in the case, and to draw such presumptions from the evidence as you think, in thinking of the testimony, are fairly to be drawn from that testimony.

"4. The court instructs the jury that they are entitled to consider the refusal to allow the inspection of the plaintiff's injury as a presumption against the extent of the injury as claimed on behalf of the plaintiff."

I grant that prayer with this modification:

Provided you think that the refusal of the plaintiff in this case to permit her injury to be examined was not reasonable.

If you find from the evidence in this case that the refusal
62 to permit Dr. Ford Thompson to examine her foot—her ankle—was unreasonable, if you find that it was an unreasonable refusal, then you can draw a presumption as to the seriousness of the injury. I simply mean by that this:

The facts appear to be—they are not offered as evidence, and therefore I will have to explain them as explained by counsel for the defendant—as follows: Yesterday the defendant's counsel requested counsel for the plaintiff to permit the plaintiff to be examined by Dr. Ford Thompson. Counsel for the plaintiff stated that they would be very glad to permit the examination if it was done in the presence of the physician of the plaintiff. Thereupon efforts were made, I believe by gentlemen on both sides, to get the physicians here, to get both Dr. Chadwick and Dr. Ford Thompson here, for the purpose of examining the plaintiff's foot. It developed that they were unsuc-

cessful, and in fact they could not reach Dr. Chadwick, and therefore he was not notified and could not get here; and then in that condition of affairs the defendant's attorneys asked permission of the plaintiff, through her counsel, to have Dr. Ford Thompson examine her foot. The plaintiff's counsel thereupon replied that he would have had no objection to having her examined by Dr. Ford Thompson, provided her physician was present. They being unable to get the physicians together, he therefore declined to permit the examination. Now it is for you to say that that refusal on the part of the plaintiff was an unreasonable refusal. If it is an unreasonable refusal, then you can find from that a presumption in respect to the gravity of the injury.

If you find that it was not unreasonable, then no presumption
63 whatever would arise from the fact, and that is the view of the law which I give you.

If you therefore find for the defendant in this case, that ends your work. You simply would say, "for the defendant," and you would go no further. If, however, your verdict should be for the plaintiff, then you have to go a step farther, and find out how much, in your judgment, from the evidence in the cause, the plaintiff is entitled to, and this is the rule of damages which the court gives you:

"10. If the jury should find for the plaintiff, they are instructed that in estimating the damages sustained by her, they should take into consideration the character of the injuries sustained, the mental and bodily suffering which they may find to be the direct result of such injuries, and the extent to which such injuries have prevented her from following her ordinary pursuit or employment, and the loss of earnings resulting therefrom. And they may also, consider whether the plaintiff's said injury is likely to be permanent and the suffering and inconvenience that may result therefrom in the future."

That is to say, you may award her such damages as in the first place you may find that she has lost by reason of being interfered with in her employment, any money she lost by failing to be paid during such time as she could not fulfill the duties of her employment. You may likewise allow her for such pain and suffering as you may find from the evidence that she has endured by reason of this accident, and you may likewise, if you find that the injury is permanent,

allow her such damages as you think will compensate her
64 for the pain, suffering and inconvenience which she may endure in the future.

I have gone into this case much more fully than I expected when I started out, and have endeavored to make it as plain as I can to you, and I think perhaps I have said all that is necessary to put you in the possession of the law that governs this case.

You understand that you will appoint someone who will act as

your foreman in announcing the verdict, which of course must be unanimous, and if you find for the defendant you will simply say, "for the defendant," and if you find for the plaintiff, then in addition to saying that you find for the plaintiff, you will state how much damages you find she is entitled to.

You can now retire.

(Thereupon the jury retired to consider of their verdict.)

After the noting of the said exceptions hereinbefore set
65 forth, and the making the same a part of the record, which is also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that the defendant may have its case reviewed on appeal by the proper court, the defendant by its attorneys moves the court to sign and seal this, its bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is by the court granted; and thereupon the defendant tenders this his Bill of Exceptions, and requests the court to sign and seal the same occording to the statute in such case made and provided, and it is accordingly done, now, for then, this 12th day of February, 1904.

[SEAL.]

HARRY M. CLABAUGH.

66 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia. } ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 65, inclusive, to be a true and correct transcript of the record, as per Rule 5 of the Court of Appeals of the District of Columbia, in cause No. 45,852, At Law, wherein Rowena Thompson Dietrich is plaintiff, and the District of Columbia is defendant, as the same remains upon the files and of record in said court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3d day of March, A. D., 1904.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

IN THE

Court of Appeals, District of Columbia

January Term, 1904.

No. 1410.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ROWENA THOMPSON DIETRICH.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The appellee recovered a verdict of $5,500 and obtained judgment in the court below thereon against the appellant the District of Columbia (Record p. 5). To review errors occurring in the record and at the trial the appellant has prosecuted this appeal.

The appellee suffered personal injury from an accident resulting from an alleged defective connection of a cement sidewalk on the South side of K street Northwest with the parking at the intersection of Fourth street in this City.

The character of the injury as stated in the declaration

(Record p. 3) is that "her right ankle was thereby severely sprained, wrenched and twisted, and the ligaments thereof greatly bruised; torn and lacerated, and her *ankle and leg* seriously and *permanently* injured; and her system greatly shocked; and she was, and is otherwise, seriously hurt and *permanently* injured" * * * "and * * * is unable to walk on or use her right leg and foot."

Various witnesses including the plaintiff described the appearance of the injured member, (including the hearsay and incompetent testimony of the husband of appellee and the expert testimony of two attending physicians and a well known surgeon) respecting whether the character thereof was permanent.

Based upon such testimony and notwithstanding the fact cannot be successfully disputed, we believe that the injury was not of a permanent character, the jury rendered a verdict exorbitant in amount and excessive in character under misapprehension of the nature of the injury which the appellee has sustained, combined with evidence admitted over the objection and exception of appellant respecting other accidents at subsequent periods and other non-described differently located supposed defects in the parking sidewalk, leading the jury, with the claimed permanent character of the injury, to believe that the appellant had been guilty of aggravated negligence respecting the whole parking and sidewalk.

The heresay and incompetent testimony mentioned, which refers to the injury, was received over the objection and exception of the appellant and it was given at the very inception of the trial and gave color to the claim that the injury was of unusual permanency.

We refer to pages 7 and 8 of the Record. It there appears that C. E. Dietrich, (the appellee's husband) was about thirty feet in advance of his wife when she was hurt and that

he "rushed back to see plaintiff, and see what the trouble was, and asked her; and thereupon counsel for the defendant objected to the conversation." But the witness proceeded to state that he said to his wife "You are seriously hurt," The witness then proceeds to state that "She (his wife) said she was badly hurt." "Whereupon counsel for the defendant again objected to any conversation between witness and his wife, on the ground that the accident had happened at that time," but the court overruled the objection and an exception was noted.

Following this ruling and over the two previous objections and exceptions of the appellee, "counsel for the plaintiff told the witness to proceed with his answer, and the witness continued: I asked her, if she could walk, and she said: 'Oh, I don't know.'" * * * "and I said: 'I will go home and get a cab. You cannot go home in this condition.'"

The result was that the opinion of the husband who was not a physician to the effect that his wife *was seriously hurt* was received, and his heresay statement that he had informed his wife that *she was seriously hurt* was admitted.

Had this testimony consisted of the exclamation of the husband as a bystander to the accident, a different question might be presented, but such was not its purpose, nor the use which was made of it. We do not deny the appellant was injured, nor do we intend to argue respecting the weight of evidence regarding the fact that she was injured, but we do insist that injury or no injury the case could not be supported by incompetent and heresay testimony and that error was committed in admitting such testimony.

The injury suffered by the plaintiff is described by three physicians,—Drs. Chadwick, Stewart and J. Ford Thompson.

Dr. Chadwick was called first and described the condition of the injured joint several hours after the accident. He says (Record page 18) the injury was a sprain to the ankle

joint, and the joint was so much swollen that examination as to whether there were any broken bones or not could not be made; that he dressed it just as he would a fracture:—that he did not make out any broken bones, but the ligaments all seemed to be stretched and torn and there was a great deal of bleeding in the joint, and it was *what is commonly called a bad sprain*, that an inflammation of the synovial membranes of the joint followed, and there was a great deal of fluid, and it was some months in getting the swelling reduced. He treated her, except when he was on his vacation, until the latter part of December, 1902. Since then he only saw her when she came to his office, and that he last examined the limb on the 4th of November 1903 (Record page 19). He further states that the limb was practically disabled between August 2, and the latter part of December 1902. On direct examination he is definitely asked respecting the permanency of the injury in this form:—(Record page 19) Q. Now Doctor, as to the permanent effect or character of this injury, what have you to say." A. "Well, I can only give you an opinion. *It would take time, of course, to tell that.* The joint is affected. If it is like I saw it on the 4th of November, it is weak and the ligaments are loose and there is pain and swelling, synovitis, probably chronic synovitis, and of course *if that persists she is going to be permanently disabled.* I should rather expect the joint to be permanently disabled.

Q. And that is your opinion? A. Yes sir, that is my opinion. (That is, if chronic synovitis persists he should expect the joint to be permanently disabled).

On cross-examination the Doctor stated *that the injury consisted of a badly sprained ankle* (Record page 20).

Upon being asked to what extent should Mrs. Dietrich have used this limb, the doctor stated, "Well, I thought that she ought to get about with it, and use it moderately, so as to

get back as much of the normal motion of the joint as she could and yet not severely enough to excite new inflammation." (Record bottom of page 21)

He is distinctly asked whether she will recover from the injury (Record page 22). Q. You do not mean to say that this lady will not recover from the injury, do you? A. *I would not say that she would not.* I say that my opinion is that she will always have a weak joint, with the most favorable circumstances that joint will always be weak, certainly for a long time.

Dr. Stewart testified that he saw the plaintiff after Dr. Chadwick left the city from the 10th of August to the 23d of August, 1902. (Record page 22). When he first saw her the joint was very much inflamed, and there was a good deal of fluid in the joint, but he could not make out any fracture. In respect to this fluid the Doctor does not say that it would cause any permanent injury.

During the two weeks this physician attended appellant, "the inflammation had subsided to a certain extent, *and there was not as much fluid there.*" (Record middle of page 23).

On the day he testified, he examined the appellant's injury and says (Record same page) that he found that the joint was still damaged; there is *some* chronic synovitis there, *with a small amount of fluid, not so very much in the joint,* and there is some thickening around the joint."

He is then asked: Q. Knowing what you do about the character of this particular injury that Mrs. Dietrich sustained, and your knowledge of the character of such injuries, what is your opinion as to its permanency?

A. Well, *my opinion* is *that the joint will never be like* it was originally. *It will be a weak joint and will give her considerable pain from time to time in my opinion.* (Record page

23). This is, to a certain extent, true of every physical injury.

Dr. J. Ford Thompson, who has been practicing surgery thirty years was called as a witness. The other two physicians were general practicioners, but Dr. Thompson has made a specialty of surgery.

After considerable controversy respecting a hypothetical question embodying the features of this case, Dr. Thompson testified: (Record page 25) "*I should say that it ought not to be a permanent injury*, simply for the reason that it ought to be cured. It rarely happens that a sprain is permanent unless it has been neglected in some way, or that there is some peculiarity on the part of the patient. You may take a rheumatic patient or a gouty patient, sometimes with a sprain of the ankle joint especially, and it is very persistent, but I do not think I have ever seen a case that was not cured if it was treated properly.

Dr. Thompson says: (Record page 26) *A sprain of the ankle joint is one of the commonest injuries in surgery. I have seen hundreds of them I suppose, and as I say, I cannot recall a case in all my experience that has not recovered.* Something might have happened that you have not told me about. Chronic inflammation might set up, and give rise to these adhesions, and interfere with the free motion of the joint and give pain for an indefinite length of time, but it is very seldom that you have these cases. I have had those cases, and continued for a long time, but never one that did not get well. *I say that cases of sprain ought to recover. I give my general opinion as to whether such a condition should be curable. Surgery would be a very sad life if sprains were not curable.*

On cross-examination (Record bottom page 26 and top page 27) Dr. Thompson says that if there was a great deal of bleeding into the joint, it would indicate that the sprain

was a very bad one, and that the ligaments are more or less lacerated and torn in any bad case of sprain. And the tearing of the ligaments indicates a bad sprain of course, and if it is followed by intense swelling and bleeding into the joint, *that it would indicate a bad sprain.*

Upon being asked: what would that indicate as to the *possibility* of her future suffering from it, after this lapse of time, he answered that, "*It would indicate that it would be impossible for a doctor to tell, or to put a limit to the recovery to such a case; it ought to be curable, and that he cannot say that he would expect it to be a permanent injury, because he had not seen a case of a mere sprain that was permanent.* That after a year and a half with the patient still suffering it would be very difficult to fix any limit, and that such cases ought to be curable by massage and proper treatment, and that he *hardly knows of any condition there that ought to be permanent,* althought it is *possible* that such a condition might be.—The counsel asked: Is it *possible?* Yes, if the parts have been unusually inflamed and adhesions resulted, of course, *it is impossible to express an opinion.*

Q. And would these conditions indicated in the question show such a condition as could *possibly* produce a permanent injury?

A. Well, about as near any case I could well imagine.

But the true rule was referred to in the answer to the question asked on re-direct examination. That is a question effecting the probability of permanency of injury, viz: that such condition as *that "would not probably result in a permanent injury"* and that witness had never seen a case in which it did. (Record bottom of page 27).

The prior condition of Mrs. Dietrich's health was such that permanent injury ought not to have resulted or was not likely to result from the injury she received.

Dr. Thompson stated that except in rheumatic and gouty cases, he never had known of a case that did not recover.

The appellant was injured August 2, 1902; she returned to her work in a shoe store on December 1st following, but did not wait on customers until about February 1st, 1903, since which time and at the time of the trial she was actively employed, with casual exceptions, in her business. (Record pp. 16 and 17).

Yet she recovers by this judgment more than is usual in this jurisdiction for greater injuries.

ASSIGNMENT OF ERRORS.

1. The court erred in admitting the opinion and heresay evidence of the appellee's husband respecting the extent of her injury and his statements to his wife after the accident.

2. The court erred in admitting the statements of the appellee to her husband respecting her injury (Record page 8).

3. The court erred in instructing the jury that "they may also consider whether the plaintiff's said injury is likely to be permanent." (Prayer bottom of page 28 and page 36.)

4. The court erred in its refusal to instruct the jury that "On the question of negligence of the defendant the jury should consider that at the time of the accident the place where it occurred was illuminated by the light in front of McDevitt's saloon or any other lights and that adjacent to the parking, the sidewalks on K street afforded a reasonably safe way, and *if they should so find from the evidence* and find from the evidence under all the circumstances that the defendant was not negligent then their verdict should be for the defendant." (Record top of page 29 modification of defendant's 1st prayer.)

5. The court erred in admitting evidence of other alleged non-described defects than the one alleged in the declaration, not shown in themselves to have been defects in the parking sidewalk, and having no relation to the injury nor to notice of the defective connection between the two sidewalks complained of.

6. The court erred in refusing to instruct the jury that there was no sufficient evidence afforded by the witness Green of previous stumbling over the space where bricks were left out between the cement walk and parking and that the falling of such persons or their stumbling, as described by the witness, excepting his stumble, is not sufficiently shown to have been occasioned by such leaving out of said bricks. (Defendant's prayer No. 3 Record bottom of page 29 and top of page 30) and in refusing to strike out the testimony of the witness Green respecting the alleged accidents occuring at said place, excepting the occurance in which he stumbled. (Record top of page 15).

7. That no cause of action can be maintained nor has been stated against the appellant.

ARGUMENT.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

These assignments are not addressed to anything descriptive of the accident, nor are they addressed to any exclamation of pain or suffering uttered by the appellee, nor to the physical change in the injured ankle occasioned by the accident.

The statements contained in the conversations objected to are hearsay and opinion evidence and do not relate to the matters above mentioned, and do not explain the accident.

These statements were wholly irrelevant to the issue.

How was it legally proper to prove that the husband said to his wife, "You are seriously hurt," even had he been a physician, or that he "asked her, if she could walk and she said: 'Oh, I don't know' " or that the husband said: "I will go home and get a cab. You cannot go home in this condition."?

Statements or declarations of opinion, however, are not admissible in evidence on this principle (*res gestae*) and this, though they were accompanied by acts tending to show that the declarant really entertained the opinion so expressed.

24 Am. & Eng. Ency. Law (2d ed.) 664.

What evidence is admissible under a liberal interpretation of *res gestae* is illustrated in Railroad Co. *vs.* McLane, where the declarations of the injured boy a few minutes after his accident to the effect that the conductor shoved him off the car were admitted. The court observed: "It is certainly true, that it is not always easy to determine when declarations *having relation to an act done*, and professing to *explain and account for such act*, are admissible as part of the *res gestae.*" * * * "In the case of Rex *vs.* Foster, 6 C. & P. 325. * * * a statement made by a party injured immediately after he was knocked down, *as to how the accident happened*, was admissible."

W. & G. R. R. Co. *vs.* McLane 11 App. Cases D. C. 220-222.

"The *res gestae* are the statements of the cause made * * * almost contemporaneously with its occurrance, and those relating to the consequences made while the latter subsisted and were in progress."

Travellers Ins. Co. *vs.* Mosley 8 Wall 397.

In respect to a blow the evidence was: "What effect has it upon your right ear?" This was objected to as calling for a conclusion. The objection was overruled and the witness

answered: "Made me entirely deaf."

The court said: "It was entirely incompetent for the witness, who was not an expert, to give an opinion as to the effect which the blow produced upon her ear. She could only state facts.—The testimony was permitted to remain in the case, and it must be presumed to have been considered by the jury, and to have affected their verdict."

Stevens *vs.* Rodger, 25 Hun. 54.

This inadmissible testimony above noted, aided materially the persistent and strongly urged claim to which the supreme importance was given by appellee's counsel, that the injury was one of unusual severity and permanence and also aided, to the prejudice of the appellant, in the rendition of this extravagant verdict based also upon evidence which did not justify the inference of the permanent character of the injury as appears from our third assignment of error.

THIRD ASSIGNMENT OF ERROR.

We assume that none other than a physician or expert can be allowed to testify whether such injury is permanent. By permanent injury in this connection we do not mean weakness which may continue in greater or less degree, nor some impairment of the flexibility of the joint nor even a total absence of some pain at all times. We mean *permanent disability* which prevents use of the limb such as was contended for, advised by the court and found by the jury in their verdict.

All the evidence is preserved in the bill of exceptions which states, (Record bottom of page 27) that no further evidence was offered on behalf of either of the parties.

Reduced to proper conclusions the record shows that the injury consisted of (a) bad sprain, (b) longer in recovery than usual, (c) that the injured tissues will not become perfectly

normal again, (d) that there was constant improvement from the beginning without new inflammation, and (e) that the injury is not permanent.

No person testified that the injury was permanent.

Dr. Chadwick made the most favorable statement for the appellee and he said that "It would take time, of course, to tell that," and if chronic synovitis "persists she is *going to be* permanently disabled." And upon being asked (Record page 22) whether he means to say that she will not recover from the injury the Doctor testified: "I would not say she would not."

The whole extent of Dr. Stewart's testimony is "That the joint will never be like it was originally. It will be a weak joint and will give her considerable pain from time to time in my opinion." (Record page 23).

The whole effect of Dr. Thompson's testimony, viewing it in the most favorable light to the appellee, is that it is *possible* but not *probable* that the injury may be permanent.

That is the test, the difference between a possibility and a probability.

"The rule is well settled that, in order to recover damages on the ground that an injury is permanent, the evidence must show *such permanency with reasonable certainty.*

The amount of the verdict ($1,500) makes it quite certain that the jury must have found the injury to have been permanent. To allow a verdict to be based upon such conjectural evidence would be to defeat the ends of justice." Sidewalk case. ~~Collurs~~ Collins *vs.* City of Jamesville 99 Wis. 464.

Appellate Court will not consider excessive damages unless record contain all the evidence. id.

Consequences which are contingent, speculative or merely possible, are not proper to be considered in ascertaining damages in personal injury cases.

To entitle apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature, *are reasonably certain to ensue.*

Storm *vs.* N. Y. L. & E. etc. R. Co. 96 N. Y. 306.

Present and probable future condition of limb were proper matters of inquiry but not possibility of second fracture.

Lincoln *vs.* The Saratoga &c. R. R. Co. 23 Wend 425-435.

We are aware that no exception appears in the record on this point. But this court is not bound thereby to refuse to reverse this judgment and we quote the following instances on the pleadings, on want of evidence and on improper rulings on damages where judgments have been reversed though no objection was made and no exception was taken.

The Supreme Court has said that it can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by counsel in argument in the Supreme Court.

Garland *vs.* Davis 4 How. 131.

In Equity causes the courts have frequently refused to entertain a cause where no objection has been raised on the ground that a remedy existed at law.

There is no rule of law which prevents a complainant from assuming on appeal a ground which was not suggested in the court below.

Watts *vs.* Waddle, 6 Pet. 389.

Want of evidence to sustain a verdict may be considered as ground for reversal, *although no motion or request was made in the lower court to instruct the jury.*

Chief Justice Fuller said: "No motion or request was made that the jury be instructed to find for the defendants

or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet *if a plain error was committed* in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

Mr. Justice Harlan said: "I concur with my brethren in holding that the judgment against Peterson and Johansen should be reversed, and a new trial ordered as to them. But I am of opinion that the judgment against Wiborg should also be reversed."

Wiborg *vs.* U. S. 163 U. S. 632-658-660.

Notwithstanding the general rule that objections not taken in the court below will not be allowed on appeal, a combination of grave errors makes such principle inapplicable.

Washington R. *vs.* Bradley's 10 Wall. 299.

So where exception was not fully taken a judgment against two defendants was reversed for error in allowing exemplary damages against both when inapplicable to one.

Washington Gas Light Co. *vs.* Lansden 172 U. S. 534.

Sec. 7 of the Act approved February 9, 1893, provides that this court "Upon such appeal * * * shall review such order, judgment or decree, and affirm, reverse, or modify the same as *shall be just.*"

FOURTH ASSIGNMENT OF ERROR.

The lights about the place of accident were numerous. There were gas lamps near to the place of accident, and across the street, and there was a saloon on the opposite corner of K and 4th streets. Though these lights are not described in the bill of exceptions they are a part of the geography of

the city. Some description of these lights is given by the witness Massey (Record top of page 12). Evidence was given on behalf of the plaintiff tending to show more or less darkness of the location at the time of the accident (Massey, Record page 12, Green page 13, Hann, page 15 and the plaintiff who said: "It was dark" page 16). We admit that the question of light or no light was a proper one for the consideration of the jury, but we object that the court refused to grant the appellant's first prayer and to the modification thereof made by the court, (Record page 29).

Our contention on the facts was, that the place was actually illuminated, as opposed to the opposing contention that the place was dark at the time of the accident. The court below modified said prayer because McDevitt was asked the condition of the light in front of the door of his saloon at *half past ten* when the accident occurred about "9 or 9:30 o'clock" in the evening (Record page 7). This being the basis of refusal, notwithstanding the mistake in the question, we submit that the court was in error respecting the want of evidence of the existence of this light at the time of the accident. McDevitt who was appellee's witness, "testified that he was in his place on the evening of the accident; that there is a lamp over the doorway of his saloon with four Welsbach burners of *one hundred candle power each*, which were lighted that night. In response to a question whether this lamp was lighted at half past ten the witness answered, yes, and that the lamp was lighted up to two or three minutes of twelve o'clock, and said witness also described the lights inside of his saloon and said that the lights from his place reach the point of the accident, and fifteen feet beyond it, clear to the curb on the K street and Fourth street sides. (Record near bottom of page 10). But the fact that this *four hundred candle power lamp*, which was located within 25 or 30 feet (Record top page 9) of

the point of accident, was lighted at the time of the accident is fixed positively by another witness for the appellee, Roland F. Hann, who testified, "that on the night of the accident this lamp was lighted, but how many burners it had he did not know." (Record middle of page 15). It is shown by the Record, that Hann was at this place that night only at the time of the accident. The rejected part of the prayer did not require the jury to find as a matter of fact that at the time of the accident the place was so illuminated, but only left that matter for their consideration "if they should so find from the evidence." (Record page 29).

FIFTH ASSIGNMENT OF ERROR.

The accident occurred simply by reason of a defective connection between the new cement sidewalk on K street and the brick parking adjacent thereto between the iron fence on the West and a tree to the East of the fence some fifteen feet. The husband testified that "She (appellee) was right at the edge of that (the new cement walk) down in a kind of excavation about three or four feet East from the fence." (Record page 9). "Said witness proceeded further to testify that at the place where the accident occurred, there was a depression of about 18 inches in width extending out from the sidewalk and of about the depth of four or six inches, and of a length of about twelve or thirteen feet from the fence out." (Record bottom of page 8). It appeared from the testimony of this witness that the depth was greatest at the place of accident, "where it ranged from two to three or four inches in depth," (cross-examination Record bottom of page 8). Howard Dixon Loud testifying of the place of accident said, "that the brick walk there was about two inches lower than the new sidewalk, and was evidently in course of repair; that at the place where the

plaintiff stumbled and fell there were no bricks at all, making a depression of four or five or perhaps six inches below the level of the new sidewalk; that it was a ragged place, the widest part of which the witness thought was perhaps fifteen or eighteen inches; *that the plaintiff must have crossed at the center*, and that the bricks were removed from the corner of the fence to the sidewalk on 4th street to some extent, and that none of them had been joined up close to the sidewalk; that the plaintiff was injured *about five feet from where the tree stood.*" (Record page 11). Massey testified, "that between the tree and the fence * * * the place was in pretty bad condition." (Record page 11) Green testified: "that when the new side walk was laid, of course the new sidewalk was left higher than the brick, and left considerably higher, until the top of the bricks came about underneath the base of the cement." (Record page 12). The appellee testified: that when she "*went* to cross over diagonally across the parking, that suddenly she felt her foot go down, her right foot, and the ball of her foot struck an uneven surface and bent under her." (Record page 16). The cause of action stated in the declaration and to which the above evidence was addressed was a *particular defect* in that the appellee "negligently removed or displaced certain bricks from that portion of said brick pavement next adjoining the South line of the said sidewalk of said K street, *for the purpose of laying a cement or asphalt sidewalk* in place of the brick sidewalk so torn up as aforesaid, and did so negligently, carelessly and improperly *lay, or caused to be laid, the said cement or asphalt sidewalk with or to the said brick pavement* occupying that part of the parking aforesaid, that the surface of the said cement or asphalt sidewalk was elevated above the surface of the said brick pavement, in consequence whereof * * * there was made and caused to be made a dangerous hole or depression of a depth of,

to wit, 6 inches below the surface of said cement sidewalk, and of a width of, to wit, 12 inches, which hole or depression extended a distance of, to wit, 15 feet *along the line where the said cement sidewalk and the said brick pavement, so occupying the part of the parking aforesaid, should have been properly joined together.*" (Record page 2).

We submit that not only was defect charged a *particular defect,* but it was so emphatically and carefully pleaded that any other or different defect, or depression was by the pleadings *wholly excluded from the case.*

Yet, notwithstanding, over the objection and exception of the appellee the witness MeDevitt was allowed to describe a different defect at another place and stated: "There was a depression of four or of four or five feet to the West of the tree, consisting *of a hole* of about two or three inches deep and two or three feet wide; to the East and West the said hole was about a foot and a half or two feet wide and had been filled up since." (Record bottom page 9.) "And thereupon *the witness further testified that he did not know how this depression was made, and did not remember when the depression was made, because it was there when witness first came there; that he could not say that the depression was made by the removal of the old bricks, but to the best of his knowledge that depression was there before they started the new sidewalk.*" (Record top of page 10).

The same error occurred during the giving of testimony by the witness Massey when he was recalled for further examination. His statement was: "that before the time of this accident" * * *. "he saw a lady stumble there over this hole in the daytime." And said witness was asked: "*Was that hole in the place where the people passed?* and answered 'Yes sir.' And thereupon on further cross examination the witness stated that *the place where the water stood was not the place where the bricks were out at the time of*

the accident, and that he saw a lady stumble *there* (at a different place than the place of accident) in the noon daytime; and being asked what month it was the witness said: "I thing it was the month of August,' but he could not tell what time in the month, because he did not give much attention to it; and being asked 'what year it was he answered that it was in the year sixty-four, and he asked isn't this year sixty-four' (that is, meaning a year after appellee's accident) and was told that this was the year 1903." (Record bottom of page 14 and top of page 15).

We now have three locations i. e. the place of accident, the place described by McDevitt, and the place where the water stood, the two latter having been expressly stated to have been other places than the place of accident.

To this evidence of accident before (or since) appellee's injury, counsel for appellant objected and excepted to the admission of evidence of such defects because, among other grounds the place was not "the place of said accident." (Record page 15). The difference in liability between the kind of defect alleged in the declaration which was *special, peculiar and particular*, and the two other defects mentioned is obvious, for in the former class the Municipality is liable without notice and the court so instructed the jury (Record page 28 prayer 8) while in the latter actual or constructive notice is a precedent condition. The case was tried as one of actual notice. No evidence was needed therefore on the question of notice and on such grounds the evidence was inadmissible; the first class too was in respect to a sidewalk and the latter referred to parking. Then also the description of the general defects was too indefinite, and insufficient to establish a defective condition of either sidewalk.

SIXTH ASSIGNMENT OF ERROR.

Not only was evidence of two of the defects above men-

tioned improperly received but insufficient evidence was improperly admitted respecting stumbling of persons over one or both of them, and there was also error in refusing to grant appellant's prayer No. 3 (Record bottom of page 29).

The witness Green in his testimony (exception in Record page 15) spoke of the plaintiff as being hurt there though he also testified that he did not see her hurt. (Record top of page 13). Yet the court notwithstanding previous notice refused to strike out this hearsay testimony. (Exception Record page 15). It is plain that Green was speaking of the plaintiff. He testified "that it (the place between the cement sidewalk and the parking) was in that condition *when the woman was hurt* * * * that he *heard* that *a lady had fallen there* at that point where he had just spoken about; that he *heard* it on Monday morning * * * that he knew *this lady* was hurt and at that time the bricks were out, and it was not fixed up until after *the lady was hurt.*" He was also asked "whether he had seen *or knew of* anybody else falling at this place *during the summer* while these bricks were left in this condition." (Record page 13) "And thereupon the witness answered 'Yes. *Of course I don't know the names of the people, but I have seen the people.* Of course I was standing in front of McDevitt's place, and I seen one night they were coming along there, and it was quite a little dark there, and they fell on this place here. Of course those trees—the tree takes the shade of that lamp across the street, and the further side you can't see. Of course I seen a lady and gentleman walking along there, and one of them fell. The lady only fell about down to her knees, and the gentleman catched her up and said: 'It's a wonder they don't fix that place;' and then they went on. I seen that myself. *And then of course there was others in the summer there.*" (Record page 13). The plaintiff was injured on the second day of August, but Green was not confined to that day nor to any

previous day but, on the contrary, is given according to the calendar twenty-nine more summer days in which to describe accidents. Clearly, we think, evidence that the witness had *heard* of people falling or saw them fall in the summer of 1902, was inadmissible on any ground and it is plain that its admission signified to the jury that a pitfall existed there and greatly prejudiced them. We distinctly asked the court and were denied our request "to strike out the testimony of the witness George Lindsay Green respecting the alleged accidents (mentioned) at said place (Record page 15.)

There was error too in allowing Green to testify that a lady stumbled "somewhere along about the same time, *he supposed*, that the plaintiff received her injury." (Record bottom of page 13). This was not a mere form of expression for Green had only *heard* that plaintiff had fallen and it was clear *supposition*, as he says, on his part. The Record states (page 14) "thereupon witness further testified that he had seen men come along there and had seen men stumble." This was another error, for no time prior to plaintiff's injury was fixed.

Because of the errors set forth we respectfully submit that the judgment in this case should be reversed and the cause remanded for a new trial.

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